Supreme Court, U.S.
FILED

No. 09-710 DEC 7 - 2009

OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL PRESTON HALL,
Petitioner,

v.

CARINA NICOLE TENNISON,
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

E. Earle Burke
THE BURKE LAW GROUP, LLC
199 Peters Street
Suite A
Atlanta, Georgia 30313
(404) 688-1210

Counsel for Petitioner

December 7, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the State of the Georgia violated the Biological father's Fourteenth Amendment Right to the Equal Protection and his Fifth Amendment Right to due process when it denied his petition to legitimate, establish custody and visitation.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties.

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Petitioner, Michael Preston Hall respectfully request that a Writ Of Certiorari be issued to review the judgment of the Trial Court which the Georgia Appellate Courts refuse to review.

OPINIONS BELOW

The Supreme Court of the State of Georgia issues an order denying the Petitioner from Certiorari (App. A).

The Petitioner for Certiorari was filed to Certiorari after the Court of Appeals of the State of Georgia's June 5, 2009 ruling denying Petitioner's Motion for Reconsideration of the Court's denial of Petitioner's Discretionary Appeal on May 8, 2009. (App. B, App. C)

The Discretionary Appeal was filed to appeal the Cobb County Superior Court's March 26, 2009 Order.(App. D).

STATEMENT OF JURISDICTION

The Supreme Court of The State of Georgia referred to hear the case by issuing an order on September 8, 2009, denying Petitioner's Petition for Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person

shall...be deprived of life, liberty, or property without due process of law...."

The Fourteenth Amendment to the United States Constitution provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Background of the March 26, 2009 Order

Mr. Hall and the Respondent engaged in a dating relationship for more than seventeen (17) months. After four (4) months into the relationship, Respondent became pregnant. Mr. Hall and Respondent did not live in the same Texas city, before or after the pregnancy. Their relationship continued and they communicated on a daily basis and visited each other throughout the pregnancy. Respondent gave birth to their son, Braylon Michael Hall in Amarillo, Texas on June 19, 2005. Mr. Hall was present for the delivery which happened later than expected. He traveled to Borger, Texas to be with Respondent for almost two (2) weeks before their son was born. Mr. Hall and Respondent continued their dating relationship after Braylon's birth.

Mr. Hall began his involvement with his son's care at birth and he voluntarily initiated making child support payments to Respondent immediately after his son was born. Shortly after Braylon's birth, Mr. Hall's father established a college fund for him and Mr. Hall also began contributing to the fund.

Respondent moved with the infant to Georgia in August of 2005. Before she moved to Georgia, Mr. Hall, Respondent and their son, Braylon visited in Texas, Arizona and Iowa. Mr. Hall moved to Arizona after his son was born. Mr. Hall came to Georgia to visit with his son and Respondent within weeks after they relocated to Georgia. Respondent, Mr. Hall and their son also traveled to visit with his family in Iowa, after the dating relationship ended. During each of his visits with his son, before and after Respondent was married, Mr. Hall participated in Braylon's care including things like changing his diapers, feeding him and purchasing his first car seat.

Mr. Hall and Respondent's relationship ended in or about December 2005, and Mr. Hall voluntarily increased the amount of his support payments in 2006. Respondent began dating Joseph Edward Tennison after her relationship with Mr. Hall ended and they were married in December of 2006. Throughout Respondent's dating relationship with Mr. Tennsion and prior to their marriage, Mr. Hall continued to communicate with Respondent on a consistent basis. He also continued to travel to Georgia to visit with his son.

Respondent's husband, a Marine Corps pilot, was commissioned to Virginia just after their marriage. Mr. Hall traveled to Virginia to visit with his son on

more than one (1) occasion although he lived on the West Coast. Shortly after the Virginia Commission, Respondent's husband was transferred to Florida. Mr. Hall traveled to Florida to visit with his son and did so on more than one (1) occasion. Mr. Hall traveled from the West Coast to see his son in all the states Respondent has lived in as a result of her husband's Military career. Mr. Hall continued to voluntarily make child support payments on a consistent basis and contribute to his son's college fund. Even after Respondent's husband filed a Petition for Adoption, the voluntary child support payments continued. Since the birth of his son, Mr. Hall has consistently been involved in his son's care and has supported his son financially.

B. The Proceedings Below

On August 8, 2008, Respondent's husband, Joseph E. Tennison filed a Petition to Adopt Mr. Hall's son, Braylon Michael Hall in the Cobb County Superior Court.

On November 4, 2008, Mr. Hall filed a Petition to Legitimate, Establish Custody and Visitation in a separate Cobb County Superior Court.

On February 26, 2009, the trial court conducted a hearing regarding Mr. Hall's Petition to Legitimate, Establish Custody and Visitation. At the end of the hearing, the Trial Court, on the record, denied the Motion to Legitimate, noting that, "this child could have been legitimated before he was ever born. He did not - - it did not happen. And so I'm going to hold that he's abandoned his opportunity to legitimate this child by not legitimating the child before he was born and

now waiting until a Petition to Adopt by someone else was filed before he did that."

On March 26, 2009, the Trial Court signed an Order prepared by Respondent's attorney denying Petitioner's Petition for Legitimation, Establish Custody and Visitation. Pursuant to O.C.G.A. § 5-6-35 Mr. Hall filed a timely Application for Discretionary Appeal, appealing the Trial Court's decision. At the time Mr. Hall filed his Application, the transcript was not available, and was not included with the Application for Discretionary Appeal.

On May 4, 2009, Respondent filed her Response to the Application for Discretionary Appeal and on May 18, 2009 the Court of Appeals denied the Application for Discretionary Appeal.

After receiving the transcript from the Court Reporter, on May 20, 2009, Mr. Hall filed his Motion for Reconsideration and included specific excerpts from the trial transcript. Regrettably, on June 5, 2009, the Court of Appeals denied the Motion for Reconsideration. Mr. Hall then sought relief from the Supreme Court of the State Of Georgia. On September 8, 2009, the Georgia Supreme Court refused to hear the case.

The Petition for Adoption was still pending before the Cobb County Superior Court during the appellate process, however, the Cobb County Superior Judge that was handling the Adoption matter issued a final order on September 23, 2009, terminating the Parental rights of Mr. Hall who was never given a hearing in that matter.

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE RULINGS BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS ON UNWED FATHER'S CONSTITUTIONALLY PROTECTED INTEREST IN THEIR RELATIONSHIP WITH THEIR CHILDREN.

Mr. Hall's Petition for Certiorari should be granted because the rulings below conflict with this court's prior rulings on unwed father's Constitutionally protected interest in their relationship with their children.

In delineating the contour of this right the court has consistently held that under the due process clause the court should in fact look at "whether the person claiming Constitutional protection has an interest that the Constitution recognizes." If the answer is yes, then the next question is whether "The State's interests in limiting the extent of the procedure that will attend the deprivation of that interest." *Michael H. v. Gerald D.,* 491 U.S. 110, 145 (1989). *(Citing Logan v. Zimmerman Bruch Co.,* 455 U.S. 422, 428 (1982))

This court has held that due process under the Fourteenth Amendment requires that "Before a State may sever rights of a parent in his natural child that state must support its allegations of the parents unfitness by at least clear and convincing evidence." *Santosky v. Kramer,* 455 U.S. 745, 747 (1982).

Furthermore in *Lehr v. Robertson,* 463 U.S. 248 (1983) this court in recognizing the Constitutional protection of the unwed father, this court noted that "[t]he significance of the Biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. Id at 262. This right of due process extends to an unwed father who demonstrates a commitment to parenthood by participating in the life of his child. *Caban v. Mohammed*, 441 U.S. 380 (1979)

Under Georgia Adoption Law, the Biological father loses all parental rights to the child unless he files a petition to legitimate the child. O.C.G.A. 19-8-12(b) provides in pertinent part as follows.

> (b) If there is a Biological father who is not the legal father of a child and he has not executed a surrender as specified in paragraph (2) of subsection (e) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7, he shall be notified of adoption proceedings regarding the child in the following circumstances:

Mr. Hall never surrendered his parental rights to his child. Despite receiving defective notice, Mr. Hall filed his Petition to Legitimate his son pursuant to subsection (c) of 19-8-12 which provides that:

> (c) When notice is to be given pursuant to subsection (b) of this Code section, it shall advise such Biological father who is not the legal father that he loses all rights to the child and will neither receive notice nor be entitled to

object to the adoption of the child unless, within 30 days of receipt of such notice, he files:

(1) A petition to legitimate the child pursuant to Code Section 19-7-22 Or an acknowledgment of legitimation pursuant to Code Section 19-7-21.1; and

(2) Notice of the filing of the petition to legitimate or acknowledgment of legitimation with the court in which the action under this Code section, if any, is pending and to the person who provided such notice to such biological father."

Finally, subsection (f) or 19-8-12 goes on to say that:

(f) A biological father who is not the legal father loses all rights to the child and the court shall enter an order terminating all such father's rights to the child and such father may not thereafter object to the adoption and is not entitled to receive further notice of the adoption if within 30 days from his receipt of the notice provides for in subsection (b) of this Code section he:

(1) Does not file a legitimation petition and give notice as required in subsection (e) of this Code section;

(2) Files a legitimation petition which is subsequently dismissed for failure to prosecute; or

(3) Files a legitimation petition and the action is subsequently concluded without a court order declaring a finding that he is the father of the child."

Based on the statute, Mr. Hall preserved his parental rights by filing his Petition to legitimate his minor. To date however, Mr. Hall was never given a full and fair opportunity to legitimate his son or to be heard in the adoption proceedings.

The Supreme Court of The State Of Georgia in the case of *In Re: Baby Girl Eason*, 257 Ga. 292 (1987), recognized the gravity and importance of a biological Father's ties to his child and the competing interest of the Mother and the adopting parent. In holding that an "unwed father possesses an opportunity interest protected by due process of law", the Court cited the United States Supreme Court decisions in the cases of: *Stanley v. Illinois,* 405 U.S. 645 (1972). *Quilloin v. Walcott,* 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); and *Lehr v. Robertson,* 463 U.S. 248 (1983).

In *Stanley* this Court held that due process of the law under the Fourteenth Amendment entitled Mr. Stanley to a hearing on his fitness as a parent and that to afford other parents such a hearing and deny him was a denial of equal protection guaranteed by the Fourteenth Amendment. 405 U.S. 645.

The evidence before the trial court did not support the Courts decision to deny Mr. Hall's Petition to Legitimate his son. The trial court failed to make a legal determination as to whether Mr. Hall abandoned his opportunity interest and failed to make any

determination whatsoever regarding Mr. Hall's fitness or whether it was in the best interest of the child not to allow Mr. Hall to legitimate his child. The trial court, by failing to provide Mr. Hall with the hearing on the "fitness test" that he was entitled to receive, violated Mr. Hall's due process right under the Constitution.

Furthermore, the trial court's final order fails to set out which test, if any, was used for assessing legitimation. *Jones v. Smith*, 250 Ga. App. 486 (2001). The Findings of Facts and Conclusion of Law do not support a decision under either the best interest test or the parental fitness test. *Id.*

The step father in his adoption proceeding was no doubt given an opportunity to show that it is in the interest of Mr. Hall's son that he be allowed to adopt the child and to further show his fitness as a parent. In contrast Mr. Hall was not given this opportunity.

While there is no question that there are competing interests of the biological father, the child's mother and the prospective adoptive father, these interests must be considered in conjunction with what is in the best interest of the child and the biological father's fitness. In paragraph 19 of the trial court's order, the court stated "to permit the Petitioner at this late date to step in and assert rights and responsibilities that he has clearly abdicated by virtue of his own willful actions would irrefutably cause harm to the child." The evidence regarding what Mr. Hall did since the birth of his son is inconsistent with any abdication of rights on the part of Mr. Hall. By denying Mr. Hall's Petition the court took away his standing to object to the adoption and in effect made a determination that the

step father was more fit then Mr. Hall. Moreover, the Georgia Appellate Court by refusing to hear the case determined that Mr. Hall was not fit without due process of law.

In *In Re: Baby Girl Eason*, 257 Ga. App. 297 (1987) the Georgia Supreme Court set out the procedure the Trial Courts should follow in legitimation cases. First the court must determine whether the father has abandoned his opportunity interest to develop a relationship with the child and then the trial court must determine fitness, and if the parent is fit, legitimation should be granted.

The Georgia Court of Appeals in 2008 reiterated the steps that the Trial Court should follow in ascertaining whether legitimation is proper. In *Binns v. Fairnot,* 292 Ga. App. 336 (2008), the Georgia Court of Appeals held that the court must first determine "whether the biological father has abandoned his opportunity interest to develop a relationship with the child. Then, depending on the nature of the [biological] father's relationship with the child and other surrounding circumstances, the standard for evaluating whether legitimation is appropriate is either a test of his fitness as a parent or the best interest of the child." *Id. (citing Jones v. Smith,* 250 Ga. App. 486 (2001). The Trial Court in Mr. Hall's case denied him either test when it denied his Petition to Legitimate his son.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE GEORGIA STATUTE REQUIRING THE UNWED FATHER TO SEEK DISCRETIONARY APPEAL FROM THE DENIAL OF HIS PETITION TO LEGITIMATE VIOLATES THE UNWED FATHER'S PROCEDURAL DUE PROCESS RIGHTS.

The Petition should be granted because the Georgia Statute requiring the unwed father to seek discretionary Appeal from the denial of his petition to legitimate violates the unwed father's procedural due process rights.

In 2007, the Georgia Legislature Enacted Act 264, H.B. No. 369 Ga. Laws 2007 p. 556 §3 certified as O.C.G.A. §5-6-35(a1)(12). The Statue reads in pertinent part that:

(a) Appeals in the following cases shall be taken as provided in this

Code section:

(2) Appeals from judgments or orders in divorce, alimony, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgment or orders;

Orders terminating parental rights are specifically listed in subsection (12) of the statute.

The statute further provides that:

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the Appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

The law is essentially unconstitutional because it takes away the Appeals rights of the unwed father whose Legitimation Petition has been denied. In order to appeal the Trial Courts denial of the Petition to legitimate the unwed father is required to seek application for discretionary appeal as oppose to filing a direct Appeal. By taking away the unwed father's right to seek review of the denial of his Legitimation Petition, the Trial Court is essentially the Georgia court of last resort for Mr. Hall. See e.g. *Alexander v. Guthrie,* 216 GA. App 460 (1995). (Holding that the Superior Court does not have Jurisdiction to enter order terminating fathers parental rights other than in an adoption proceeding). The Trial Court's decision denying Mr. Hall's Petition to legitimate his son is in fact a termination of his parental rights which is not subject to direct appeal.

Furthermore, Mr. Hall's constitutionally protected interests in maintaining a relationship with his son is violated because he has not been allowed to directly appeal the trial court's decision therefore violating his rights to Due Process. Because the Georgia Appellate

Courts have refused to hear Mr. Hall's case, this Court is in true sense of the phrase Mr. Hall's "court of last resort".

CONCLUSION

This case presents a question of exceptional importance as to whether an unwed father who has had involvement with his minor child has a constitutionally protected interest in the relationship with the child. Here, if the trial court's decision is allowed to stand Mr. Hall will be denied due process of the law and permanently damaged as a result of a wrong decision terminating his rights as a parent. By granting Mr. Hall's Petition for Certiorari; however, this Court can correct the trial court's decision which directly defies this Court's longstanding holding that an unwed father who has some involvement with his child has a Constitutionally protected interest and a right to due process. Accordingly, Mr. Hall respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

THE BURKE LAW GROUP, LLC

E. Earle Burke
Counsel of Record
Attorney for Plaintiff
199 Peters Street SW, Suite A
Atlanta, Georgia 30313
Telephone (404) 688-1210
Facsimile (404) 688-1251
Email eburke@burkelawatl.com

APPENDIX

APPENDIX A

**SUPREME COURT OF THE
STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA**

**Case No. S09C1683
COURT OF APPEALS CASE NO. A09D0340**

[Filed September 8, 2009]

MICHAEL PRESTON HALL,)
)
v.)
)
CORINA NICOLE TENNISON,)
)

E. Earle Burke
THE BURKE LAW GROUP, LLC
199 Peters Street
Suite A
Atlanta, GA 30313

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

APPENDIX B

COURT OF APPEALS OF THE STATE OF GEORGIA ATLANTA

Case No. A09D0340

[Filed June 05, 2009]

MICHAEL PRESTON HALL,	)
	)
v.	)
	)
CORINA NICOLE TENNISON,	)
	)

The Court of Appeals passed the following order

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

[SEAL]

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta JUN 05, 2009

I certify that the above is a true extract From the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

3a

Clerk.

/s/

APPENDIX C

COURT OF APPEALS OF THE STATE OF GEORGIA ATLANTA

APPLICATION NO. A09D0340

[Filed May 18, 2009]

MICHAEL PRESTON HALL,	)
	)
v.	)
	)
CORINA NICOLE TENNISON,	)

The Court of Appeals hereby passes the following order:

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.
90029

08110149

[SEAL]

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta MAY 18, 2009

I certify that the above is a true extract From the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/

APPENDIX D

IN THE SUPERIOR COURT
FOR THE COUNTY OF COBB
STATE OF GEORGIA

Civil Action File No. 08-1-10149-05

[Filed March 26, 2009]

MICHAEL PRESTON HALL,)
)
Petitioner,)
)
vs.)
CORINA NICOLE TENNISON,)
)
Respondent.)

FINAL ORDER DENYING PETITION TO LEGITIMATE, ESTABLISH CUSTODY VISITATION

The within and foregoing matter having come before this Court on Petitioner's Petition to Legitimate, Establish Custody and Visitation on February 26, 2009 and the parties and their attorneys being present and the Court having heard testimony, received evidence and argument of counsel, it is hereby ORDERED; ADJUDGED and DECREED:

FINDINGS OF FACT

1.

The court finds that Petitioner and Respondent acknowledge the Petitioner is the biological father of the minor child, BRAYLON MICHAEL HALL, born June 19, 2005.

2.

The Court finds that Respondent is the legal mother of the minor child, BRAYLON MICHAEL HALL, born June 19, 2005.

3.

The Court finds that Petitioner did not request nor obtain DNA testing to determine if he was the biological father.

4.

The Court finds that Petitioner never married the legal mother.

5.

The Court finds that Petitioner has not been determined to be the minor child's legal father by a final paternity order of a court.

6.

The Court finds that Petitioner had not previously sought a final order of Legitimation by any Court.

7.

The Court finds that Petitioner has never lived with the minor child.

8.

The Court finds that Petitioner did not provide my financial support or medical care during Respondent's pregnancy or hospitalization for the birth of the minor child despite repeated requests by Respondent. Respondent was forced to apply for Medicaid assistance during her pregnancy and birth of the minor child.

9.

The Court finds that Petitioner did not register with the Putative Father Registry as required by law.

10.

The Court finds that Petitioner did occasionally visit with the minor child at Respondent's residence or Respondent traveled with the minor child to visit Petitioner at his residence; however, the Petitioner saw the child approximately seven (7) days in 2005; approximately fifteen (15) days in 2006; approximately fourteen (14) days in 2007 and nine (9) days in 2008.

11.

The Court finds that in 2009, Petitioner visited with the minor chld for one evening on the eve of trial at the request of Respondent. The Court finds that

other than this brief visit, Petitioner last saw the minor child in August, 2008.

12.

The Court finds from the child's birth to his present age, Petitioner sent one card to the minor child, purchased a plastic batman car and the movie "Polar Express" as gifts for the minor child.

13.

The Court finds the Petitioner did provide financial support for the minor child; however, said support was not consistent every month.

14.

The Court finds that Petitioner did not provide any healthcare insurance coverage for the minol child upon his birth to present day despite repeated requests to do so by Respondent thereby forcing the minor child to have state provided health care insurance coverage by Peachcare.

15.

The Court finds that Petitioner has not provided emotional support for the minor child, nor established an emotional or physical bond with the minor child and is therefore, a stranger to the child.

16.

The Court finds that Respondent's Husband, Joseph Edward Tennison, filed a Petition for

Step-Parent Adoption on August 11, 2008 which is now pending.

17.

The Court finds that Petitioner filed the instant action in response to the Petition for Step-Parent Adoption filed by Joseph Edward Tennison.

18.

The Court finds that Respondent approached Petitioner on several occasions for Petitioner to take legal action; however, Petitioner did not do so until the instant action was filed.

19.

The Court finds that to permit the Petitioner a: this late date to step in and assert rights and responsibilities that he has clearly abdicated by virtue of his own willful actions would irrefutably cause harm to the child.

20.

The Court finds as the sole legal parent, Respondent alone was responsible for the child throughout the pregnancy. As the sole legal parent, she alone had the right to make the decision to first give him life, and second give him a better life by marrying Step-Father.

21.

The Court finds that Petitioner has abandoned his opportunity interest with respect to the minor child and that legitimation is not in the child's best interest. The Court finds that Petitioner had ample opportunity to avail himself of his rights and responsibilities through the legal system but did not until the instant action which was filed after Step-Father filed tile Step-parent adoption.

22.

The Court finds that Petitioner no longer has standing to intervene in the step-parent adoption filed by Joseph Edward Tennison.

CONCLUSIONS OF LAW

Pursuant to In re: Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1987) the Court has determined hy clear and convincing evidence based upon the above referenced findings of fact that the biological father has abandoned his opportunity interest in the minor child. Therefore, the Court need not address the remaining factors considered in *Eason*.

ORDER

Based upon the foregoing, the Court here by *denies* Petitioner's Petition for Legitimation, Establish Custody and Visitation.

SO ORDERED, this 25th day of March, 2009, *nunc pro tunc*, February 26, 2009

/s/Watson L. White
HONORABLE WATSON L. WHITE
Judge, Cobb Superior Court
Cobb Judicial District

PRESENTED BY:

/s/Danna Wolfe
DANNA L. WOLFE
Attorney for Respondent
State Bar Number 773310
MARSH FROST & WOLFE
319 Atlanta Street, Suite 230
Marietta, Georgia 30060
770-528-0456

CONSENTED AS TO FORM:

_____
FRANCES E. PACE
Attorney for Petitioner
Slate Bar Number _____

No. 09-710

SUPREME COURT, U.S.
JAN 15 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL PRESTON HALL,

Petitioner,

v.

CORINA NICOLE TENNISON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL L. MARSH
Counsel of Record
DANNA L. WOLFE
MARSH FROST & WOLFE
319 Atlanta Street, Suite 230
Marietta, Georgia 30060
770-528-0456

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether an exhaustive evidentiary hearing at which Petitioner appeared, represented by counsel, and presented testimony is sufficient to satisfy the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

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STATEMENT OF THE CASE

This action involves Petitioner's efforts to legitimate his then three (3) year old child. Petitioner contends that just because he is the biological father of the child, he has a constitutional right to legitimate the child and that he was denied due process of law when the court denied his claim.

The facts surrounding Petitioner's Petition for Legitimation and the trial court's denial are set forth in the Court's Final Order. App. 6a-12a.[1] Notably, the Trial Court found:

Petitioner and [Respondent] did have a relationship which produced a son born on June 19, 2005. App. 7a. Though present at the birth of the child, Petitioner herein did not provide any financial support or medical care during Respondent's pregnancy or hospitalization for the birth of the minor child despite repeated requests by Respondent. App. 8a. Further, Petitioner did not provide medical insurance for the minor child subsequent to his birth despite repeated requests by Respondent forcing the child to obtain state provided health care insurance coverage. App. 9a.

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[1] The Petition contains a three-page discussion entitled "STATEMENT OF THE CASE, A. Background of the March 26, 2009 Order." Pet. 2-4. These factual assertions are not supported by citations to the record or the opinions below, and instead are Petitioner's version of the facts, which Respondent disputes.

Petitioner did occasionally visit with the minor child by either traveling to the child or the minor child and Respondent traveling to Petitioner's residence. App. 8a. In 2005, there were approximately seven days; in 2006, approximately fifteen days; in 2007 approximately fourteen days; and nine days in 2008 when Petitioner visited with the minor child. Upon the filing of the Petition for Step-Parent Adoption in August of 2008, Petitioner ceased contact with the minor child because it was awkward. App. 8a-9a.

Petitioner inconsistently paid child support for the minor child, and had sent the minor child a plastic batman car and the movie "Polar Express" as gifts. App. 9a. However, Petitioner insignificantly increased the amount of the support being paid because of his refusal to obtain health insurance for the minor child after his birth and after Respondent's repeated requests for funds to care for their minor child. *Id.* Despite constant requests by Respondent for the Petitioner to take appropriate legal action for the sake of his child, he only did so after Respondent's husband filed the Petition for Step-Parent Adoption. App. 10a. Implicit in the court's findings is the conclusion that Petitioner had no intention of legitimating the child until he was compelled by the pending adoption proceeding to take action.

REASONS FOR DENYING WRIT

Petitioner advances two flawed arguments. He argues that the trial court ruling conflicts with this Court's prior holdings on the issues of a) unwed fathers' constitutionally protected interests in their relationships with their biological children and b) the Georgia discretionary appeal statute violates his procedural due process rights. Pet. 6-14. Petitioner's arguments have no merit because neither argument was raised at the trial court level which is required by this Court's Rules, specifically Rule 14.

I. THE TRIAL COURT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT DECISIONS ON THE ISSUE OF UNWED FATHERS INTEREST IN THEIR RELATIONSHIP WITH THEIR BIOLOGICAL CHILDREN.

Petitioner cites four United States Supreme Court cases, all of which arose from legitimation matters filed in adoption cases and not singularly by legitimation cases. *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979); *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 177 L. Ed. 2d 614 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972). The Georgia Supreme Court in the case of *In re: Baby Girl Eason*, 257 Ga. 292, 358 S.E.2d 459 (1988), determined, by analyzing all four cases, that an unwed father possesses an opportunity interest to develop a relationship with his children

which is constitutionally protected. However, that opportunity can be lost if not timely and diligently pursued, an important element of the *Eason* holding ignored by Petitioner.

In Georgia, the standard of review to be used in a Petition for Legitimation is whether there is clear and convincing evidence that the biological father has abandoned his opportunity interest in the minor child. *In re: Baby Girl Eason*, 257 Ga. 292, 296 (358 S.E.2d 459) (1988). Petitioner erroneously states the holding of *Eason*. *Eason* holds that only if the Court finds that the father has NOT abandoned his opportunity interest does the Court's application of the parental fitness standard come into play. *Id.*

In the matter of *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) the United States Supreme Court clearly noted the "mere existence of a biological link does not merit equivalent constitutional protection." Further, *Caban*, as stated in *Eason*, that "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child . . . at that point it may be said that he acts as a father toward his children." *Id.*, at 389.

Finally, in *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 177 L. Ed. 2d 614 (1983), which was quoted in *Eason*, it was stated "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments

that derive from the intimacy of daily association, and from the role plays in 'promoting a way of life' through the instruction of children . . . as well as from the fact of blood relationship." *Id.,* at 295, 296. Until such time as a biological father marries the mother, or an order has been entered declaring a biological father to be the legal father of the minor child in question, the mother maintains all rights pertaining to the minor child. And while the biological father has an opportunity interest protected by due process, should the biological father be found to have abandoned his opportunity interest with regard to the minor child, the court has discretion to deny legitimation. *Eason, supra.*

Petitioner does not set forth any portion of the record to indicate the evidence presented was contrary to the holding in the trial court and therefore this Court has nothing to review and should deny the Petition.

Petitioner cites the case of *Binns v. Fairnot*, 292 Ga. App. 336 (2008), stating the trial court failed to consider the second prong of the legitimation inquiry to determine whether the father was fit to parent the child or whether granting the legitimation would be in the best interest of the child. Pet. 11.

Binns v. Fairnot is clearly distinguishable. In *Binns*, the financial support was "constant" and there was evidence the father had an "avowed interest in establishing and maintaining a relationship with the child . . . " *Id.* In the instant matter, the support was

sporadic as were the visits and the visits ceased in August 2008. App. 8a-9a.

Here, the trial court did fulfill the second prong of *Binns* and did establish that the legitimation is not in the minor child's best interest as articulated in its Final Order as well as determining that the biological father had lost his opportunity interest to develop a relationship with the minor child. App. 11a.

Further, Petitioner claims the decision by the Georgia Supreme Court to deny Petitioner's Application for Discretionary Review and subsequent Motion for Reconsideration violates their own mandate in *Binns*. Petitioner further claims that while doing so, the Court of Appeals also violated Petitioner's constitutional rights. Denying the Legitimation Petition does not impact a constitutional right of Petitioner as he was afforded due process in that he was heard on his Petition for Legitimation; he just did not like the result.

The trial court found there was clear and convincing evidence the Petitioner had lost his opportunity interest with respect to the minor child despite his sporadic visits and sporadic financial support to the minor child. The trial court further found there was clear and convincing evidence that if Petitioner were to step in and now assert rights and responsibilities abdicated by virtue of his own willful actions, it would irrefutably cause harm to the minor child, and that, therefore, legitimation is not in the best interest of the minor child.

II. THE GEORGIA STATUTE ON DISCRETIONARY APPELLATE REVIEW FOLLOWING A DENIAL OF LEGITIMATION PETITIONS DOES NOT VIOLATE UNWED FATHERS DUE PROCESS RIGHTS.

Petitioner did not receive the result he desired in the lower court. He was afforded due process by having a full and fair hearing at the trial court level. Said court did NOT terminate Petitioner's parental rights; it only denied his Petition for Legitimation.

Additionally, effective January 1, 2008, O.C.G.A. § 5-6-35(a)(12) now requires appeals from orders terminating parental rights be by application rather than a matter of direct appeal. *In the Interest of: A.C., a child,* No. S09A0931, Supreme Court of Georgia (2009). Therefore, Petitioner's argument that denial of his Petition for Legitimation is in effect a termination of his parental rights, allowing then a direct appeal, fails in that from 2008 going forward, appeals from terminations of parental rights are no longer afforded a direct appeal.

Georgia Appellate courts usually will not rule upon any constitutional challenge not raised and ruled on in the trial court. *In re: L.C.*, 273 Ga. 886, 888, 548 S.E.2d 335 (2001). Petitioner did not raise a constitutional challenge to O.C.G.A. § 5-6-35(a)(2) at the trial court level, therefore he cannot raise the issue now. Further, the Court, in *Dept. of Human Resources v. Phillips*, 268 Ga. 316, 320, 486 S.E.2d 851 (1997), stated "One cannot complain of a

judgment, order, or ruling [one's] own procedure or conduct procured or aided in causing, nor can [one] be heard to complain of a question on appeal a judgment which [one] invokes."

CONCLUSION

Petitioner was afforded due process at the trial court level and the trial court appropriately followed the law of the State of Georgia. There was no violation of Petitioner's Fourteenth or Fifteenth Amendment rights. Respondent respectfully requests this Court deny the Petition for Certiorari.

Respectfully submitted this 15th day of January, 2010.

MICHAEL L. MARSH
Counsel of Record
DANNA L. WOLFE
MARSH FROST & WOLFE
319 Atlanta Street, Suite 230
Marietta, Georgia 30060
770-528-0456

Attorneys for Respondent